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Case No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1980

LEONARD KULICK, SIDNEY KULICK, HOWARD SHIRVAN and STANLEY SHIRVAN,

Appellants,

v.

DEPARTMENT OF REVENUE, STATE OF OREGON,

Appellee.

On Appeal from the Supreme Court of Oregon

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Is the State of Oregon prohibited by the Due Process Clause of the Fourteenth Amendment of the United States Constitution from imposing a tax against nonresident individual shareholders for their shares of both the distributed and undistributed income of an Oregon "subchapter S" corporation, the income of which is earned entirely within Oregon, where the stockholders did not have any contact with the State of Oregon other than ownership of shares in such Oregon corporation?

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TABLE OF AUTHORITIES

Cases Cited

Harvester Company v. Department of Taxation, 322 U.S. 435, 64 S. Ct. 1060, 88 L. Ed. 1373 (1944) 2, 3, 4

Wisconsin Gas & Electric Company v. United States, 322 U.S. 526, 64 S. Ct. 1106, 88 L. Ed. 1434 (1944) 2, 4

Wisconsin v. J. C. Penney Company, 311 U.S. 435, 61 S. Ct. 246, 85 L. Ed. 267, 130 A.L.R. 1229 (1940) 2, 3, 4

In the Supreme Court of the United States

MOTION TO DISMISS OR AFFIRM

Appellee, Department of Revenue, State of Oregon, moves pursuant to Rule 16, for an order dismissing the appeal in this case on the ground that the appeal does not present a substantial federal question; and in the alternative, appellee moves for an affirmance of a judgment of the Supreme Court of the State of Oregon, on the ground that any federal question on which the decision below depends is so unsubstantial as to not need further argument.

OPINIONS BELOW

Appellants' statement is accepted.

JURISDICTION

Appellants' statement is accepted.

CONSTITUTIONAL PROVISIONS AND STATUTES

Appellants' statement is accepted.

STATEMENT OF THE CASE

Appellants' statement is accepted.

ARGUMENT

This case presents no substantial federal question not previously decided by this Court

We will not repeat here the analysis of appellants' arguments contained in the opinion of the Oregon Supreme Court in this case, although we submit that it is correct. We would add the following thereto.

The question presented by this appeal has already been decided by the United States Supreme Court in *Wisconsin v. J. C. Penney Company,* 311 U.S. 435, 61 S. Ct. 246, 85 L. Ed. 267, 130 A.L.R. 1229 (1940). The conclusion of the United States Supreme Court in *Wisconsin v. J. C. Penney Company, supra,* is further elaborated on and explained in the cases of *Harvester Company v. Department of Taxation,* 322 U.S. 435, 64 S. Ct. 1060, 88 L. Ed. 1373 (1944) and *Wisconsin Gas & Electric Company v. United States,* 322 U.S. 526, 64 S. Ct. 1106, 88 L. Ed. 1434 (1944).

In *Wisconsin v. J. C. Penney Company, supra,* the United States Supreme Court was presented with the question of whether the Wisconsin privilege dividend tax for the privilege of declaring and receiving dividends out of income derived from property located and business transacted in the State of Wisconsin applied to a foreign corporation licensed to do business in Wisconsin without offending the Fourteenth Amendment of the United States Constitution. The privilege dividend tax for purposes of convenience was collected by Wisconsin at the corporate level rather than from the individual shareholder. In deciding that case, the court said:

> "* * * That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple

but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction. (Citing cases)." *Wisconsin v. J. C. Penney Company,* 311 U.S. 435, 444, 61 S. Ct. 246, 250, 85 L. Ed. 267, 270 (1940).

Oregon has also given the taxpayers' Oregon corporation the substantial privilege of carrying on business in Oregon and has accorded the same privilege to the appellants by enabling them to carry on the business within the State of Oregon in corporate form. Therefore, Oregon like Wisconsin is entitled to impose a tax upon the income that appellants have earned in Oregon through their corporation.

In *Harvester Company v. Department of Taxation,* 322 U.S. 435, 64 S. Ct. 1060, 88 L. Ed. 1373 (1944), Harvester was urging to the Department of Taxation of Wisconsin that a tax which it was required to withhold and pay to Wisconsin on Dividends paid to nonresident shareholders and which was approved by the U. S. Supreme Court in *Wisconsin v. J. C. Penney Company, supra,* was a tax improperly assessed against its nonresident shareholders. In making its decision that the imposition was proper, the United States Supreme Court stated:

"The power to tax the corporation's earnings includes the power to postpone the tax until the distribution of those earnings and to measure it by the amounts distributed. (Citations omitted) In taxing such distributions Wisconsin may impose

the burden of the tax either upon the corporation or upon the stockholders who derive ultimate benefit from the corporation's Wisconsin activities. Personal presence within the state of the stockholder-taxpayers is not essential to the constitutional levy of a tax taken out of so much of the corporation's Wisconsin earnings as is distributed to them. A state may tax such part of the income of a nonresident as is fairly attributable either to property located in the state or to events or transactions, which, occurring there, are subject to state regulation and which are within the protection of the state and entitled to the numerous other benefits which it confers. (Citations omitted) And the privilege of receiving dividends derived from corporate activities within the state can have no greater immunity than the privilege of receiving any other income from sources located there." Harvester Company v. Department of Taxation, 322 U.S. 435, 441-442, 64 S. Ct. 1060, 1064, 88 L. Ed. 1373, 1379 (1944).

Wisconsin was also challenged on the same tax in which it was contended that the tax was a corporate tax rather than a tax on the shareholder. In deciding that the tax was not that of the corporation but rather that of the shareholder the United States Supreme Court again reiterated the reasoning that was contained in the questions in both *Wisconsin v. J. C. Penney Company* and *Harvester Company v. Department of Taxation,* to the effect that the state has the jurisdiction to tax corporate income to a nonresident stockholder on the income derived by the corporation in the State of Wisconsin. *Wisconsin Gas & Electric*

Co. v. United States, 322 U.S. 526, 64 S. Ct. 1106, 88 L. Ed. 1434 (1944). If the State of Wisconsin can tax a nonresident stockholder of a foreign corporation on the portion of the income earned by that corporation in Wisconsin, it follows that Oregon has the jurisdiction to tax the income of a nonresident stockholder derived from income of a domestic corporation all of the income which is earned in Oregon.

CONCLUSION

The United States Supreme Court in the cases submitted above has made it abundantly clear that Oregon does have the power to tax appellants, unrestricted by the United States Constitution.

Respectfully submitted,
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